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In the Supreme Court

of the United States

OCTOBER TERM, 1975

No. 74-1274

ABBOTT LABORATORIES, *et al.*,
Petitioners,

-v.-

PORTLAND RETAIL DRUGGISTS ASSOCIATION, INC.
Respondent

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF FOR ALABAMA PHARMACEUTICAL ASSOCIATION FLORIDA PHARMACEUTICAL ASSOCIATION GEORGIA PHARMACEUTICAL ASSOCIATION KENTUCKY PHARMACEUTICAL ASSOCIATION MISSISSIPPI PHARMACEUTICAL ASSOCIATION NORTH CAROLINA PHARMACEUTICAL ASSOCIATION SOUTH CAROLINA PHARMACEUTICAL ASSOCIATION TENNESSEE PHARMACEUTICAL ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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Pursuant to Rule 42 of the Rules of this Court, the Alabama, Florida, Georgia, Kentucky, Mississippi, North Carolina, South Carolina and Tennessee Pharmaceutical Associations hereby respectfully move this Court for leave to file the attached brief *amicus curiae* in the above-captioned case.

The brief urges the Court to affirm the decision of the Court of Appeals for the Ninth Circuit in the above entitled case.

Counsel for the respondent has consented to the filing of the attached brief. Counsel for the petitioners have not consented to its filing.

The Interest of the Pharmaceutical Associations of Alabama, Florida, Georgia, Kentucky, Mississippi, North Carolina, South Carolina, and Tennessee

The Pharmaceutical Associations of Alabama, Florida, Georgia, Kentucky, Mississippi, North Carolina, South Carolina and Tennessee (referred to hereafter as "the associations") are the professional organizations representing the individual pharmacists in these respective eight states. The general purposes of these eight professional pharmaceutical associations are to promote the public welfare through the profession of pharmacy and to represent the interest of the individual pharmacists within these eight states.

It is in the furtherance of the above-stated purposes that these eight state pharmaceutical associations wish to express to this Court their views as to the significance of the decision of the Court of Appeals for the Ninth Circuit and to urge the affirmance of that decision.

The decision of the Court of Appeals has

massive precedential consequences to retail pharmacy in all eight of the above-mentioned states. A decision contrary to that of the Court of Appeals would threaten the existence of community retail pharmacy in all eight states.

The associations contend that the holding of the Court of Appeals in this case is the only logical interpretation of the Nonprofit Institutions Act and the Robinson-Patman Act consistent with the general purpose of both statutes. The construction of the Nonprofit Institutions Act urged by petitioners in the Ninth Circuit Court of Appeals would result in a circumvention of the purpose of both this statute and the Robinson-Patman Act, thus creating potential for a monopolistic climate which could destroy community retail pharmacy.

The Nonprofit Institutions Act was enacted to confer benefits upon nonprofit institutions such as nonprofit hospitals in an area where the nonprofit hospital operates on a different functional level than retail pharmacy. A non-profit hospital providing medication to patients admitted to the institution, either as bed patients (patients occupying room and board facilities within the institution) or as emergency room patients, is not on a competitive or functional level with retail pharmacy. A nonprofit hospital engaging in the resale of medication to members of the general public, not admitted to the institution as bed patients or emergency room patients, assumes a competitive and

functional level with that of retail pharmacy.

The ultimate result of a decision allowing nonprofit hospitals to compete on the functional level of retail pharmacy without the restrictions of the Robinson-Patman Act of 1936 would destroy the retail pharmacy segment of local business. It would destroy retail pharmacy because it would allow and encourage nonprofit hospitals to resell pharmaceuticals to the general public in competition with retail pharmacy at a price often below the acquisition cost of retail pharmacies. The simple economics of such a business climate would result in the closing of retail pharmacies and the monopolizing of pharmacy by nonprofit hospitals. Such a result would adversely affect the delivery of health care services at the community level.

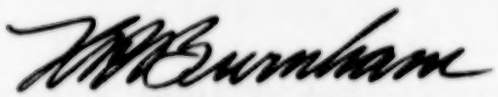
There are, within each of the eight states listed in this petition, nonprofit hospitals that purchase supplies from the petitioners. The question of whether these nonprofit hospitals may utilize the Nonprofit Institutions Act to purchase drugs for resale and operate on the same functional level as retail pharmacy in the resale of these drugs is of paramount importance to the pharmacies of these eight states. It is this "functional level" test which the associations would urge the Court to apply in affirming the Court of Appeals' decision.

In view of the tremendous impact on pharmacy in these eight states that a reversal of the Ninth Circuit Court of Appeals would have, surely it is appropriate that the

pharmacists of these eight states be given the opportunity to convey to the Court their view of the application of this exemption to the Robinson-Patman Act as it affects their profession.

Accordingly, the Alabama, Florida, Georgia, Kentucky, Mississippi, North Carolina, South Carolina and Tennessee Pharmaceutical Associations respectfully urge this Court to grant their motion for leave to file this brief as *amicus curiae*.

Respectfully submitted,



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Interest of *Amicus Curiae*

The interest of Alabama Pharmaceutical Association, Florida Pharmaceutical Association, Georgia Pharmaceutical Association, Kentucky Pharmaceutical Association, Mississippi Pharmaceutical Association, North Carolina Pharmaceutical Association, South Carolina Pharmaceutical Association, and Tennessee Pharmaceutical Association as *amicus curiae* is set forth in the preceding motion for leave to file this brief.

Question Presented

Is the Nonprofit Institutions Act exemption to the Robinson-Patman Act of 1936 applicable to the purchase of drugs by a nonprofit hospital for resale to patients not admitted to the hospital as inpatients or as patients in the emergency clinic?

Statutes Involved

1. Section 1 of the Robinson-Patman Act, 49 Stat. 1526, 15 U.S.C. § 13(a):

> "(a) It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the United States or any Territory thereof

> or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them. . . ."

2. The Nonprofit Institutions Act, 52 Stat. 446, 15 U.S.C. § 13c:

> "Nothing in sections 13 to 13b and 21a of this title, shall apply to purchases of their supplies for their own use by schools, colleges, universities, public libraries, churches, hospitals, and charitable institutions not operated for profit."

Statement of the Case

1. Proceedings in the Lower Courts

Respondent filed this action for treble damages and injunctive relief as the assignee of claims for sixty retail pharmacies doing business in metropolitan Portland, Oregon, charging petitioners, twelve drug manufacturers, with violation of the Robinson-Patman Act, 15 U.S.C. §§ 13 *et seq.* (1970). Respondent alleged that petitioners engaged in unlawful price discrimination by selling drugs to nonprofit hospitals at prices lower

than those offered to retail pharmacies.

Petitioners filed a motion for summary judgment on the respondent's claim stating as ground for the motion for summary judgment that the Nonprofit Institutions Act, 15 U.S.C. § 13c (1970) excepts the purchases of drugs by nonprofit hospitals from the Robinson-Patman Act. On May 25, 1973, the district court granted the motion of the petitioners. (Tr. 5/25/73 at 88-99.)

The Court of Appeals for the Ninth Circuit disagreed with the district court and vacated the judgment of the district court and remanded the case for further proceedings. 510 F. 2d 486. Petitioners filed a petition for rehearing which was denied on March 11, 1975. On June 23, 1975, petition for certiorari was granted by this Court.

2. Court of Appeals Decision

The Court of Appeals vacated the judgment of the district court because it interpreted the Nonprofit Institutions Act to exempt a hospital's "own use" of drugs under the statute to include only drugs administered to inpatients and to patients in the emergency room. In holding that drugs dispensed to registered hospital patients who are treated as outpatients, to inpatients as take-home drugs, and to hospital employees and staff physicians for personal and family consumption, the Court of Appeals summarized its views as:

"We may concede that in these re-

spects distribution by the hospitals can be justified as a proper and useful community service and thus can be regarded as a proper hospital function. It is not, however, the hospitals' 'own use.' Hospital use under § 13c, in our judgment, must be limited to use made by the hospital in dispensing drugs for hospital or clinic treatment of in-patients or emergency patients. The purpose for which these supplies are purchased—the use to which they are to be put—is their consumption. Section 13c can apply here only to cases in which a hospital can be said to be the consumer. It cannot apply to cases of resale by the hospital to a private consumer." [1]

Summary of Argument

In 1936 Congress enacted the Robinson-Patman Act to protect small business against discriminatory price practices of large interstate businesses.[2] The Nonprofit Institutions Act of 1938 was enacted as an exemption from the Robinson-Patman Act for nonprofit institutions in the purchase of supplies for their own use.

The issue before the Court in this case is

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1. *The Portland Retail Druggists Association, Inc. v. Abbott Laboratories, et al.*, 510 F. 2d 486, 489 (9th Circuit 1974).

2. *Federal Trade Commission v. Anheuser-Busch Inc.*, 363 U.S. 536 (1960).

whether or not large nonprofit institutions may invoke the Nonprofit Institutions Act exemption to purchase supplies "for resale" to the general public rather than for their "own use" within the institutions.

The Robinson-Patman Act of 1936 was enacted to assure that businesses operating on a competitive functional level would be on an equal basis as far as price is concerned.[3] Congress intended to eliminate price discrimination practices threatening independent merchants.

Nonprofit hospitals engaging in the sale of pharmaceuticals to patients not admitted in the emergency room temporarily or as bed patients (patients occupying room and board facilities within the institution) of the hospital are on the same functional level as retail pharmacy. When a nonprofit hospital chooses to operate on the same functional level as retail pharmacies, they are not entitled to purchase these "supplies" for resale under the Nonprofit Institutions Act exemption to the Robinson-Patman Act.

The Nonprofit Institutions Act of 1938 was enacted to allow nonprofit institutions to acquire their supplies as inexpensively as possible. This exemption was not intended for the purchase of "supplies" for resale to the general public, but rather for the institutions' own use. The Ninth Circuit Court of Appeals held, as a matter of law, that a hospital's "own use" of drugs under the statute includes only drugs administered to inpatients and to patients in the emergency room. This is the only logical construction of this exemption to the Robinson-Patman Act which will not result in the use of interstate business to destroy local business.

If a nonprofit hospital chooses to operate on the same functional level as retail pharmacy in the resale of drugs, it must relinquish its exemption from the Robinson-Patman Act as to those drugs purchased for resale to the general public in competition with community retail pharmacy.

ARGUMENT

Introduction

The Robinson-Patman Antidiscrimination Act was enacted by Congress in 1936 to protect small businesses against favoritism shown by suppliers to large buyers.[4] It provides in part that:

> "It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, . . . where such

3. *Federal Trade Commission v. Sun Oil Company*, 371 U.S. 505 (1963).

4. *Federal Trade Commission v. Anheuser-Busch Inc.*, 363 U.S. 536 (1960); *Federal Trade Commission v. Sun Oil Company*, 371 U.S. 505 (1963).

commodities are sold for use, consumption, or resale within the United States . . . , and where the effect of such discrimination may be substantially to lessen competition . . ."[5]

Two years later, in 1938, the Nonprofit Institutions Act was enacted as an exemption from the prohibitions of the Robinson-Patman Act for nonprofit institutions in the purchase of supplies for their own use. The Nonprofit Institutions Act provides:

"Nothing in sections 13 to 13b and 21a of this title, shall apply to purchases of their supplies for their own use by schools, colleges, universities, public libraries, churches, hospitals, and charitable institutions not operated for profit."[6]

The instant question before the Court is whether or not the Nonprofit Institutions Act can be used to circumvent the purpose of the Robinson-Patman Act by allowing large nonprofit institutions to invoke this exemption to purchase supplies "for resale" to the general public rather than for their "own use" within the institutions. This particular circumvention of the purpose of the Robinson-Patman Act would threaten the survival

5. Section 1 of the Robinson-Patman Act, 49 Stat. 1526, 15 U.S.C. §13(a).

6. The Nonprofit Institutions Act, 52 Stat. 446, 15 U.S.C. §13c.

of smaller local merchants (retail pharmacy), the protection of which is the very purpose of the Robinson-Patman Act.

The Court of Appeals drew a distinction between consumption of drugs within the institutions with that of consumption of drugs outside the institutions. This distinction succinctly adheres to the purpose of both the Robinson-Patman Act and the Nonprofit Institutions Act. The administration of medications to bed and emergency care patients within the institutions is by its very nature a function of the institutions in their "own use" of the medication in the treatment of their patients. These acts are not in competition with retail pharmacy and are the singular source of the medication to the patient. It is equally clear that the dispensing of medication to inpatients at the time of discharge, to hospital outpatients, to employees of the hospital and to staff doctors for personal and family use are resales to the general public in competition with retail pharmacy and violative of the Robinson-Patman Act.

I.

The Robinson-Patman Act of 1936 was enacted to assure that businesses at the same functional level would start on an equal competitive footing as far as price is concerned. [7]

7. *Federal Trade Commission v. Sun Oil Company*, 371 U.S. 505 (1963).

The Robinson-Patman Act of June 19, 1936 was enacted as a protection for small businesses which are unable to buy in quantities against competing operations of large interstate concerns.[8] Price favoritism shown by suppliers to large buyers caused congressional concern for the survival of smaller local merchants, and the 1936 Robinson-Patman amendments to the Clayton Act were passed to strengthen the Clayton Act prohibitions on price discrimination.[9] Thus the fundamental purpose of the Robinson-Patman Act is to protect the small independent businessman.

The Court's opinion explaining the basic purposes of the Robinson-Patman Act in *Federal Trade Commission v. Sun Oil*[10] expounds the position of retail pharmacy in this case. The Court stated that the basic purpose of the Act was to insure that purchasers from a single supplier would not be injured by that supplier's discriminatory practices. The Court noted that "Congress sought generally to obviate price discrimination practices threatening independent merchants and businessmen presumably from

8. *Federal Trade Commission v. Morton Salt Co.*, 334 U.S. 37 (1948); *Standard Oil Co. v. Federal Trade Commission*, 340 U.S. 231 (1951).

9. *Federal Trade Commission v. Anheuser Busch Inc.*, 363 U.S. 536 (1960); *Federal Trade Commission v. Sun Oil Company*, 371 U.S. 505 (1963).

10. 371 U.S. 505 (1963).

whatever source."[11] It is irrefutable that each of the petitioners is the single supplier of its "brand name" product and that retail pharmacies are members of that class of independent merchants and businessmen which the Robinson-Patman Act protects.

The question then must focus on the level of protection Congress intended for independent merchants and businessmen. *Federal Trade Commission v. Sun Oil Co.*, answers this query in the following language:

> "In short, Congress intended to assure, to the extent reasonably practicable, that businessmen at the same functional level would start on equal competitive footing so far as price is concerned."[12]

Hospitals dispensing pharmaceuticals to patients "admitted" to the hospital, whether temporarily in emergency room or as bed patients, are not on the same functional level as retail pharmacies. Hospitals engaging in the sale of pharmaceuticals to patients not admitted in the emergency room temporarily or as bed patients of the hospital are on the same functional level as retail pharmacy. This second category entails exactly the potentiality for price discrimination that Congress intended to alleviate with the Robinson-Patman Act. It is axiomatic that, when

11. *Federal Trade Commission v. Sun Oil Company*, 371 U.S. 505, 520 (1963).

12. 371 U.S. 505, 520 (1963).

nonprofit hospitals choose to operate on the same functional level as retail pharmacies, they must relinquish their exemption to the Robinson-Patman Act.

Unquestionably, the Robinson-Patman Act is directed against discriminatory treatment of purchasers engaged in the resale of the seller's goods.[13] Congressional intent was clearly demonstrated by the language used in the Nonprofit Institutions Act exemption limiting the exemption to purchases of supplies "FOR THEIR OWN USE."[14] The exemption extended was for "use" or "consumption" by the nonprofit institutions and not for the resale of the supplies. Hospital bed patients (patients occupying room and board facilities within the hospital) and emergency room patients have no discretion in selecting the provider of medication used to treat them and thus price discrimination is of no impact. As regards patients other than bed or emergency patients of the hospital, the patient may exercise discretion as to the provider of the medication and thus the purpose of the Robinson-Patman Act becomes of paramount consideration.

The unit dose administration of medication to patients consumed within the hospital

13. *Centex-Winston Corporation v. Edward Hines Lumber Co.*, 447 F. 2d 585 (7th Circuit 1971), cert. denied, 405 U.S. 921 (1972).

14. The Nonprofit Institutions Act, 52 Stat. 446, 15 U.S.C. §13c.

is "use" of supplies purchased by the hospital as contemplated by the Nonprofit Institutions Act exemption. Medication purchased by an individual which is administered or consumed outside the hospital, results in the resale of the "supplies" purchased by the nonprofit hospital and as a resale is a violation of the Robinson-Patman Act.

The Court of Appeals correctly distinguished between the purchases for uses which retailers cannot supply and which, therefore, can have no competitive impact on retailers and those purchases for resale by the hospital which retailers can supply.[15] Where the institutions' supplies are the single source available for the hospital's treatment of its patients, the Nonprofit Institutions Act is applicable. However, where the purchase is for resale by the hospital in competition with local retail pharmacies, the exemption from the Robinson-Patman Act is inapplicable.

II.

The Nonprofit Institutions Act of 1938 was enacted to allow inexpensive acquisition of supplies by nonprofit institutions for their own use—not for resale to the public.

15. *Ag-Chem Equipment Co., Inc. v. Hahn, Inc.*, 480 F 2d 482 (8th Circuit 1973); *Sano Petroleum Corporation v. American Oil Company*, 187 F Supp. 345 (E.D. New York 1960).

An examination of the statutory language used in the Nonprofit Institut ons Act readily reveals the restrictive phraseology employed by Congress to limit this exemption from the Robinson-Patman Act to the acquisition of supplies for the institutions' internal use. It can be fairly inferred that Congress did not intend to modify or change the purpose of the Robinson-Patman Act by the Nonprofit Institutions Act from the House Judiciary Committee's comment that "(t)he Committee does not feel that the wholesome purpose of the Robinson-Patman Act will be interfered with by the enactment of this bill . . ."[16] The construction applied by the Court of Appeals in this case is the only application of the Nonprofit Institutions Act exemption that would not interfere with the wholesome purpose of the Robinson-Patman Act.

The restrictive phrase, ". . . purchases of their supplies for their own use . . ."[17] is the focal point of the issues in this case. The question is whether a nonprofit hospital may acquire drugs for resale to a private consumer at an acquisition price that discriminates against local retail druggists. A private consumer being a consumer other than inpatients or emergency patients of the nonprofit hospital.

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16. *House Report* 2161, 7th Cong., 3d Sess., April 19, 1938.

17. The Nonprofit Institutions Act, 52 Stat. 446, 15 U.S.C. §13c.

The Court of Appeals held, as a matter of law, that a hospital's "own use" of drugs under the statute includes only drugs administered to inpatients and to patients in the emergency room.

A construction of the Nonprofit Institutions Act different from that applied by the Court of Appeals would encourage nonprofit hospitals to compete with retail pharmacy. The inevitable result of such competition would thwart the purpose of the Robinson-Patman Act and threaten the existence of retail pharmacy. In addition to destroying local business (retail pharmacy), a diminution in retail pharmacy would adversely affect the delivery of health care service at the community level.

It has consistently been adhered to by this Court that exceptions contained in statutes are to be construed strictly.[18] In *Moore v. Mead's Fine Bread Company, a Corp.*, Justice Douglas stated:

> "It is, we think, clear that Congress by the Clayton Act and Robinson-Patman Act barred the use of interstate business to destroy local business . . ."[19]

The construction by the Court of Appeals of this exception protects local business. The

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18. *United States v. Scharton*, 285 U.S. 518 (1932); *Great Atlantic & Pacific Tea Co. v. Federal Trade Commission*, 106 F 2d 667 (3rd Circuit 1939).

19. 348 U.S. 115, 121 (1954).

alternative construction proposed by petitioners will result in the use of interstate business to destroy local business.

In summary, when a nonprofit hospital purchases drugs for resale on a functional level with retail pharmacy, the purchase is not for its own use and is not exempt from the provisions of the Robinson-Patman Act by the Nonprofit Institutions Act.

CONCLUSION

For the foregoing reasons, *amicus curiae* respectfully urges that this Court affirm the decision of the Court of Appeals.

Respectfully submitted,

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